Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

~~77~~-1666

No. 76-2593

POLICE OFFICER LOUIS J. MERCADANTE;
POLICE OFFICER THOMAS McCANN;
POLICE CAPTAIN ROWEN KELLEY;
WARMINSTER TOWNSHIP, PA., *Petitioners*

v.

JOHN DAVID PITRONE, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 76-2593

TOWNSHIP OF WARMINSTER
v.
DAVID PITRONE

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

TO: THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

Petitioner, Township of Warminster, respectfully prays that a Writ of Certiorari issue to review an Order of the United States Court of Appeals for the Third Circuit entered in this proceeding on February 21, 1978.

OPINION BELOW

The opinion of the Court of Appeals for the Third Circuit and the Order of the United States District Court for the Eastern District of Pennsylvania appear in the Appendix hereto.

JURISDICTIONAL STATEMENT

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the decision of the Court of Appeals that a federal court may simply assume the existence of pendent power over wholly state based claims against a municipality based on the mere assertion of a cause of action against such municipality implied directly from the Fourteenth Amendment is in direct conflict with the terms of the amendment vesting in Congress and not the judiciary, the power to enforce the terms of this amendment by appropriate legislation?

2. Whether the decision of the Court of Appeals that a federal court may simply assume the existence of pendent jurisdiction over wholly state based claims against a municipality based on the mere assertion of a cause of action against such municipality implied directly from the terms of the Fourteenth Amendment and without inquiry into the merits of such claim is in conflict with this Court's prior decision in *Aldinger v. Howard*, 427 U.S. 1 (1976) and *Moor v. County of Alameda*, 411 U.S. 693 (1973)?

3. Whether the Court of Appeals erred in reversing the trial court's dismissal of the pendent state law claims against the Township of Warminster?

STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment XIV.

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law. . .

Section 5.

The Congress shall have power to enforce by appropriate legislation the provisions of this Article.

Title 28, United States Code, §1331. Federal Questions; Amount in Controversy; Costs.

(a) The District Courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000 exclusive of interest and costs, and arises under the constitution, laws or treaties of the United States.

Title 28, United Code §1343. Civil Rights and Elected Franchises.

The District Courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(3) to redress the deprivation under color of any State law, statute, ordinance, regulation, custom or usage of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

STATEMENT OF THE CASE

Respondent, David Pitrone, filed this civil rights action against the Township of Warminster and various named and unnamed police officers, asserting their responsibility for his alleged, unconstitutional arrest, detention and beating. The Complaint, as amended, rests on 42 U.S.C. §1983 and the Fourth and Eighth Amendment as applied to the states through the Fourteenth Amendment. The Court's jurisdiction is based on 28 U.S.C. 1343(3) and (4) with respect to the individual defendants, and 28 U.S.C. §1331(a) with respect to the township. Respondent also sought to invoke the Court's pendent jurisdiction over various state law claims against petitioner.

Respondent Pitrone premises his theory of liability against the township largely on allegations that the Township was negligent in failing to establish and enforce guidelines for the use of force and on respondent superior.

The Township filed a motion to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) and (6) for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. On September 30, 1976, the trial court, per Judge Ditter, granted the Motion to Dismiss with respect to the Township of Warminster, concluding that a cause of action could not be implied against a municipality directly from the terms of the Fourteenth Amendment. (A.4-10). The Court also dismissed the pendent state claims against the Township of the authority of this Court's decision in *Aldinger v. Howard*, 427 U.S. 1 (1976), (A. 11-12) and entered judgment pursuant to Federal Rule of Civil Procedure 54(*b*) in favor of the Township (A. 15)

Respondent timely filed a notice of appeal from the above order, and the matter was listed for oral argument before the Court of Appeals on September 9, 1977.

Prior to argument, and with the consent of all parties concerned, the City of Philadelphia filed a brief as Amicus Curiae on behalf of the Township, and participated in the oral argument.

On February 21, 1978, the Court of Appeals rendered its decision in this matter, and reversed the judgment of the trial court dimissing the Fourteenth Amendment cause of action against the Township. The Court concluded that the trial court had incorrectly reached a constitutional issue regarding the existence of an implied Fourteenth Amendment cause of action and should have addressed itself initially to the pendent state law claims against the Township. The mere assertion of the Fourteenth Amendment claim, the Court stated, provided the basis for the exercise of pendent jurisdiction and mandated avoidance of the constitutional claim.

REASONS FOR GRANTING THE WRIT

I. The decision of the Court of Appeals that a Federal Court may simply assume the existence of pendent power over wholly state based claims against a municipality based on the mere assertion of a cause of action against such municipality implied directly from the Fourteenth Amendment is in direct conflict with the terms of the amendment vesting in Congress and not the judiciary, the power to enforce the terms of the amendment by appropriate legislation.

A condition precedent to the exercise of pendent power over wholly state claims by a federal court is the existence of a federal claim which is both colorable and substantive in nature. *Hagans v. Lavine*, 415 U.S. 528, 39 L.Ed. 2d 577 (1974). In this vein, the Court of Appeals concluded that:

> . . . in this case, the plaintiffs' assertion of a Fourteenth Amendment cause of action was enough to vest the district court with the jurisdiction over the municipality. (A.20)

Petitioners assert that a cause of action cannot be judicially created against a municipality directly from the terms of the Fourteenth Amendment, for the very reason that the judicial branch lacks the power to enforce the terms of the Amendment, absent appropriate congressional legislation.[1] Nor can such a federal

1. Courts considering the Fourteenth Amendment issue and concluding that such a cause of action cannot be implied directly from the Fourteenth Amendment include; *Kostka v. Hogg*, 560 F.2d 37 (1st Cir., 1977); *Jamison v. McCurrie*, 388 F.Supp. 990 (W.D. Ill., 1975); *Perry v. Linke*, 394 F.Supp. 323 (N.D. Ohio, 1974); *Milburn v. Giard*, 429 F.Supp. 865 (E.D. Pa., 1977); *Jones v. McElroy*, 429 F.Supp. 848 (E.D. Pa., 1977); *Crosley v. Davis*, 426 F.Supp. 389 (E.D. Pa., 1977); *Anderson v. Erwin*, C.A. #76-2020 (E.D. Pa., Dec. 20, 1976); *Gresham v. City of Chicago*, 405 F.Supp. 410 (N.D. Ill., 1975); *Smetanka v. Borough of Ambridge*, 378 F.Supp. 1366 (W.D. Pa., 1974); *Perzanowski v. Salvio*, 369 F.Supp. 223 (D. Conn., 1974); See also Comment, Implying A Damage Remedy Against Municipalities Directly Under The Fourteenth Amendment, Congressional Action As An Obstacle To Extension Of The *Bivens* Doctrine, 36 Md. L. Rev. 123 (1976).

Cases deciding that a cause of action may be directly implied from the terms of the Fourteenth Amendment include *Owen v. City of Independence*, 560 F.2d 925 (8th Cir., 1977); *Gentile v. Wallen*, 562 F.2d 193 (2nd Cir., 1977); *Brault v. Town of Milton*, 527 F.2d 730, 739 (2nd Cir., 1975); vacated en banc 527 F.2d 746; *Newborn v. Morrison*, 440 F.Supp. 623 (S.D. Ill., 1977); *Dahl v. City of Palo Alto*, 372 F.Supp. 647 (N.D. Cal., 1974); *Everett v. City of Chester*, 391 F.Supp. 26 (E.D. Pa., 1975); *Patterson v. City of Chester*, 389 F.Supp. 1093 (E.D. Pa., 1975); *Maybanks v. Ingraham*, 378 F.Supp. 913 (E.D. Pa., 1974); *Pinto v. Clark*, 407 F.Supp. 1209 (E.D. Pa., 1976); Note: Damage Remedies Against Municipalities, The Constitutional Violations to Title 89 Harv. L. Rev. 922 (1976). Cf. *Davis v. Passman* 46 U.S.L.W. 2577 (5th Cir., en banc April 18, 1978).

claim be properly utilized as a basis for a federal court's exercise of pendent jurisdiction over purely state law claims against a municipality. Rather, Section 5 of the Amendment represents a texturally demonstrable constitutional commitment to a coordinate branch of government. See *Baker v. Carr*, 369 U.S. 186 (1962), explicitly vesting in Congress the exclusive power to enforce the provisions of the Amendment by appropriate legislation.[2]

The proposition that the judiciary cannot enforce the terms of the Fourteenth Amendment, absent appropriate congressional legislation, has been consistently reiterated by this Court since the seminal case of

2. It should also be clear that, in addtion to the constitutional prohibitions barring implication of the Fourteenth Amendment cause of action against a municipality, the policy reasons advanced by the Court in *Bivens v. Six Unknown Named Agents of the Federal Government*, 403 U.S. 388 (1971) requires that no such constitutional remedy can be implied herein where a federal statutory remedy, 42 U.S.C. 1983, is plainly available and where countervailing policies of federalism are involved or serve as a basis for exercise of pendent jurisdiction over wholly state matters. See also *Cort v. Ash*, 422 U.S. 66; 45 L.Ed. 2d 26 (1975).

Ex Parte Commonwealth of Virginia, 100 U.S. 339 (1879), in which the court stated:

> All of the Civil War Amendments derive much of their power from the enforcement clause. It is not said the judicial power of the general government should extend to enforcing the prohibitions and to protecting the rights and immunities guaranteed. It is not said that branch of the government shall be authorized to declare void any action of the state in violation of the prohibition. It is the power of Congress which has been enlarged. Congress is authorized to enforce the prohibition by appropriate legislation. Some legislation is contemplated to make the amendment fully effective. Whatever legislation is appropriate, that is, adopted to carry out the objectives the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect quality of civil rights and equal protection of the law against state denial or invasion, if not prohibited, is brought within the domain of congressional power. *Ex Parte Commonwealth of Virginia*, supra, at 679.

See also *Katzenbach v. Morgan*, 384 U.S. 641 (1966); *Fitzpatrick v. Bitzer*, 426 U.S. 614 (1976).

The doctrine of separation of powers, i.e., that each branch of government in the exercise of its power to be free from limitations or interference from the other branches, is literally the blueprint upon which this republic was founded. *McCullach v. Maryland*, 4 Wheat. 316; 4 L.Ed. 2d 579 (1816); *Myers v. United States*, 272 U.S. 107; 71 L.Ed. 2d 160 (19 __). In conformity with this constitutional plan, the framers of the Fourteenth Amendment vested its enforcement power explicitly in Congress, *Ex Parte Virginia*, supra. The same framers, in the exercise of their legislative power pursuant to that amendment, subsequently rejected

legislation effectively imposing upon municipalities the very liability which the Court of Appeals now concludes is a proper basis for the exercise of pendent power over purely state claims. See *Monroe v. Pape*, 365 U.S. 107 (1961); *Moor v. County of Alameda*, 411 U.S. 693 (1973); *City of Kenosha v. Bruno*, 412 U.S. 511 (1973); *Aldinger v. Howard*, 427 U.S. 1 (1976); Congressional Globe, 39th Cong., 1st Session, 2766, 2768 (1866); Congressional Globe, 42nd Cong., 777-804 (1871); Flack, the Adoption of the Fourteenth Amendment (1908).

The Court of Appeals could not properly rely upon a Fourteenth Amendment claim to support the exercise of pendent jurisdiction over state law claims against the Township of Warminster, since such power is plainly not vested in the judicial branch absent implementing congressional legislation. Since the Circuit Court's asserted basis for the exercise of pendent jurisdiction is clearly beyond its constitutional power, the Court erred in concluding that state law claims asserted as their basis for the liability herein could properly be entertained by a federal court. *Aldinger v. Howard*, supra.

II. The decision of the Court of Appeals that a federal court may simply assume the existence of pendent jurisdiction over wholly state based claims against a municipality based on the mere assertion of a cause of action against such municipality implied directly from the terms of the Fourteenth Amendment, and without inquiry into the merits of such a claim, is in conflict with this court's prior decision in *Aldinger v. Howard*, 27 U.S. 1 (1976).

In *Aldinger v. Howard*, 427 U.S. 1 (1976), this Court held that the joinder of a municipal corporation for the purpose of asserting a state claim not otherwise within federal jurisdiction is not within the jurisdic-

tional power of a federal court absent an independent federal claim against such municipality. In so ruling, this Court logically extended its holding, first espoused in *Monroe v. Pape*, 365 U.S. 167 (1961) that municipalities are immune from liability pursuant to the Civil Rights Act, 42 U.S.C.A. 1983, and evidencing the clear congressional statement underlying such exemption. As succinctly stated by the court in *Aldinger*, supra:

> Parties such as counties, whom Congress *excluded* from liability in Section 1983, and therefore by reference in the grant of jurisdiction under 1343(3), can argue with a great deal of force that the scope of that "civil action" over which the district courts have been given statutory jurisdiction should not be so broadly read as to bring them back within that power merely because the facts also give rise to an ordinary civil action against them under state law. In short, as against a plaintiff 's claim of *additional* power over a "pendent party", the reach of the statute conferring jurisdiction should be construed in light of the scope of the cause of action as to which federal jurisdictional power *hass* been extended by Congress. *Aldinger*, supra, at 18. See also. *Moor v. County of Alameda*, 411 U.S. 693 (1973); *City of Kenosha v. Bruno*, 412 U.S. 511 (1973).

It is precisely this statement of congressional purpose and underlying policy considerations concerning the scope of federal jurisdiction in such matters which is rendered nugatory by the actions of the Court of Appeals.

Relying on this Court's decision on *Hagans v. Lavine*, 415 U.S. 528 (1974), and its own very recent decision in *Flint v. Gagliardi*, 564 F.2d 112 (3rd Cir., 1977), *Petition for Cert* filed 46 U.S.L.W. 3392 (U.S. Nov. 7, 1977) (No. 77-657), the Circuit Court con-

cluded that the mere assertion of a Fourteenth Amendment claim against a municipality without more vested a federal court with jurisdiction to entertain wholly state claims alleged against the municipality, with no further inquiry into the substance of the federal claim either necessitated or desired. The net effect of this decision, in conjunction with the Circuit Court's prior decision in the *Gagliardi* case, supra, is to forever foreclose the federal courts of this circuit from inquiring into the substantive allegations which form the basis of the plaintiff 's proposed federal jurisdiction, and require these courts instead to reach only the state law matters asserted. As so candidly pointed out in the concurring opinion of Judge Gibbons herein:

> The course adopted both here and in *Gagliardi v. Flint*, supra, will probably make it unnecessary for this Court ever again to impose liability on municipalities directly under the Fourteenth Amendment. (A.22-23).

See also: *Mahone v. Waddle*, 564 F.2d 1018 (3rd Cir., 1977), *Petition for Cert* filed 46 U.S.L.W. 3430 (U.S. Nov. 22, 1977) (No. 77-731), wherein the Court stated at 1026, fn. 10 that a trial court would be required to turn to the pendent state claims and never reach the Fourteenth Amendment issue. See also *Patzig v. O'Neill*, ___F.2d___ (3rd Cir., Slip Opinion filed April 17, 1978).

This Court has consistently reiterated the proposition that a federal question must not be alleged for the sole purpose of permitting a court to exercise jurisdiction over a pendent state law claim. *Siler v. Louisville & Nashville R.R.*, 213 U.S. 175 (1909); *Mt. Healthy School District v. Doyle*, ___U.S.___; 45 U.S.L.W. 4079 (1970). Nor must a constitutional question be avoided where its effect is to abdicate the jurisdictional responsibility of the federal court system. *Hagans v. Lavine*, supra, (dissenting opinion Rehnquist, J.).Yet, the Court

of Appeal's decision mandates precisely this result. A prospective suitor to federal court is invited to simply plead a Fourteenth Amendment claim against a municipality while appending state law claims to the complaint, and then argue to the trial court that *Hagans*, supra, *Flint*, supra, and the instant case mandate that theconstitutional question not be pursued,but that the case proceed to trial solely under state law claims. In such case, the Fourteenth Amendment claim becomes a mere jurisdictional subterfuge, unrelied upon, undisposed of, and serving only to buttress federal jurisdiction over wholly state claims.

This Court's decision in *Aldinger v. Howard*, supra, requires the existence of a substantive cause of action against a municipality before pendent jurisdiction may be exercised. The decision of the Court of Appeals herein requires rejection of that proposition, invites abdication of the Court's responsibility concerning the scope of its jurisdiction, and ignores the very explicit statement of congressional action with respect to such actions. This clearly erroneous result must not be permitted to stand.

III. The Court of Appeals erred in reversing the trial court's dismissal of pendent state law claims against the Township of Warminster.

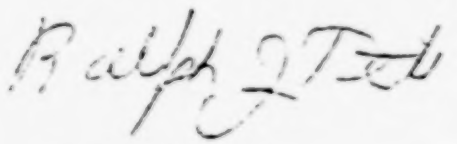
This Court has consistently reaffirmed the proposition that the decision to exercise pendent power over wholly state law claims is addressed in the first instance, to the sound discretion of the trial court. *United Mine Workers v. Gibbs*, 383 U.S. 715 (1976); *Mahone v. Waddle*, supra. In the exercise of this discretionary power, the trial court herein dismissed the pendent claims against the Township of Warminster on the authority of *Aldinger v. Howard*, supra, concluding that an implied cause of action directly from the Fourteenth Amendment did not present a substantive claim.

In reversing the decision of the trial court, the court of appeals effectively held that the lower court had abused its discretion in dismissing such claims. The inevitable conclusion emanating from this decision is that a trial court, bound by the court of appeals' decision in *Gagliardi v. Flint*, supra, and the instant matter, must not only address itself in the first instance to the pendent state claims, but would abuse its discretion if such claims were dismissed. See *Mahone v. Waddle*, supra, at 1026, Fn. 10. Such a proposition is totally inconsistent with the discretionary power to decide pendent state claims vested in the trial court by *United Mine Workers v. Gibbs*, supra, and further results in the total abdication by a federal court of its responsibilities to safeguard the jurisdiction. As such, the decision of the Court of Appeals must be reversed.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and the opinion of the Court of Appeals for the Third Circuit.

Respectfully submitted:



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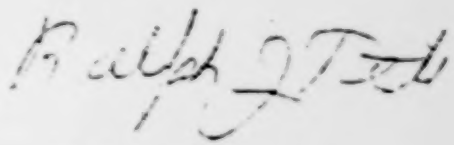
CERTIFICATE OF SERVICE

I, RALPH J. TETI, do hereby certify that on this 19th day of May, 1978, three copies of the Petition for the Writ of Certiorari were delivered by first class mail, postage prepaid, to David Rudovsky, Esquire, 1427 Walnut Street, Philadelphia, Pennsylvania 19102, Counsel for Respondent. I further certify that all parties required to be served have been served.



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IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN DAVID PITRONE
335 Aspen Street
Warminster, Pennsylvania

CIVIL ACTION

No. 75-2455

v.

POLICE OFFICER LOUIS J. MERCADANTE
POLICE OFFICER THOMAS MC MAHON
POLICE OFFICER JOHN LANGDON
OTHER UNKNOWN POLICE OFFICERS
CHIEF OF POLICE ROWEN KELLY
WARMINSTER TOWNSHIP
all situate at the intersection of
HENRY and GIBSON Avenues
Warminster, Pennsylvania

OPINION

DITTER, J. September 30, 1976

I. *Introduction and Factual Background*

Plaintiff filed this civil rights action against the Township of Warminster, Pennsylvania, its chief of police and various named and unnamed police officers, alleging their responsibility for his unconstitutional arrest, detention and beating. The complaint, as amended, rests on 42 U.S.C. §1983 and the Fourth and Eighth Amendments as applied to the states through the Fourteenth Amendment, with this court's jurisdiction based on 28 U.S.C. §1343(3) & (4) as to the individual defendants and 28 U.S.C. §1331 as to the township. Plaintiff also seeks to invoke this court's pendent jurisdiction over various state law claims against these defendants. Presently before the court are motions on behalf

of all the defendants, pursuant to Rule 12(b)(1) and (6), to dismiss the complaint for lack of subject matter jurisdiction and/or failure to state a claim upon which relief can be granted.

The essence of the complaint against Louis J. Mercadante, a Warminster Township police officer, is that he violated Pitrone's federally protected rights by an unjustifiable arrest and physical abuse. The allegations against defendants Thomas McMahon, John Langdon, and certain unidentified Warminster police officers are that they observed Marcadante beating plaintiff, took no action to stop the beating, and, in fact, encouraged Mercadante to continue.

The Township's and Police Chief Kelley's liability is premised on the allegation that they either knew or had reason to know on the basis of prior complaints to both Kelley's office and the Federal Bureau of Investigation that the officers involved in this incident were prone to act with 'excessive force and zeal . . . [and] would so act upon even the slightest provocation." [1] In addition, the complaint also seems to base the township's liability on theories of negligence (in failing to establish and enforce guidelines for the use of deadly force)[2] and respondeat superior.[3]

---

1. Complaint, paragraph 28.

2. At this juncture I accept the allegation, implicit in this theory of liability, that plaintiff's injury resulted from the use of "deadly" force, although I note that the complaint makes no mention of the instruments with which Pitrone was allegedly beaten.

3. In the state law count of his complaint, Pitrone charges Mercadante, McMahon, Langdon and the unidentified officers with assault and battery; McMahon, Langdon and the others with negligence in failing to restrain Mercadante; Kelley with negligence in failing to prevent these officers from using excessive force when he knew or had reason to know of their violent propensities; and the township with negligence in hiring and retaining Kelly who was not qualified as a police administrator and in retaining the other officers after it knew or should have known of their violent propensities.

Plaintiff seeks costs, injunctive relief against the township[4] and compensatory and punitive damages against all the defendants.

II. *The Individual Defendants*

The primary thrust of the individual defendants' arguments in support of their motion to dismiss both on the grounds of lack of subject matter jurisdiction and failure to state a claim is that the complaint lacks sufficient specificity. There is no question that "in this circuit, plaintiffs in civil rights cases are required to plead facts with specificity," *Rotolo v. Borough of Charleroi*, 532 F.2d 920, 922 (3d Cir. 1976), and that broad conclusory allegations of constitutional deprivations will not suffice. *Kaufman v.* Moss, 420 F.2d 1270, 1275-76 (3d Cir.) cert. denied 400 U.S. 846, 91 S. Ct. 93 (1970); *Negrich v. Hohn*, 379 F.2d 213, 215 (3d Cir. 1967). However, when tested by the specificity requirement imposed by the *Rotolo-Kaufman-Negrich* line of cases, the complaint herein easily passes muster against Mercadante, Langdon, McMahon, Kelly and the unidentified officers at the scene of the altercation.[5]

---

4. The equitable relief prayed for is that the court

> direct the defendant . . . [township] to make appropriate determinations whether or not the defendants hereto are suitable to be retained as policeman within the Township of Warminster, and to alter and change the present . . . internal complaint system.

Complaint (prayer for relief) paragraph 5. To the extent that the complaint can be construed as alleging that the violations of *plaintiff's* rights in *fact* resulted from inadequate internal complaint procedures and assuming other jurisdictional requirements to be met, Pitrone would have standing to challenge these inadequacies as a basis for monetary relief. *Sierra Club v. Morton*, 405 U.S. 727, 92 S. Ct. 1361 (1972). However, within the perimeters of the instant suit it appears extremely unlikely that plaintiff will be able to obtain the type of equitable relief he seeks above. See *Rizzo v. Goode*, — U.S. —, 96 S.Ct. 598 (1976).

5. The allegations that McMahon, Langdon and the other officers on the scene encouraged Mercadante to continue with the

Kelly makes the additional argument that his liability cannot be predicated on the doctrine of respondeat superior. I agree. *Milton v. Nelson*, 527 F.2d 1158 (9th Cir. 1976); *Bracey v. Grenoble*, 494 F.2d 566 (3d Cir. 1974); *Johnson v. Glick*, 481 F.2d 1028 (2d Cir.) *cert. denied sub nom. Employee-Officer John, #1765 Badge Number v. Johnson*, 414 U.S. 1033, 94 S.Ct. 462 (1973); *Padover v. Gimbel Brothers, Inc.*, 412 F. Supp. 920 (E.D. Pa. 1976). But the complaint here asserts that Kelly knew or had reason to know beforehand of the violent propensities and overzealousness of the officers involved in this incident, yet took no remedial action. This is a sufficient allegation of personal culpability on Kelly's part to withstand a motion to dismiss. Compare *Bracey v. Grenoble*, supra, 494 F.2d at 571; *Curtiss v. Everette*, 489 F.2d 516, 521 (3d Cir. 1973), cert. denied sub. nom. *Smith v. Curtio*, 416 U.S. 995, 94 S. Ct. 2409 (1974); and *Johnson v. Glick*, supra, 481 F.2d at 1034 with *Wright v. McMann*, 460 F.2d 126, 134-35 (2d Cir.), cert. denied 409 U.S. 885, 93 S.Ct. 115 (1972), and *Noon v. Winfield*, 368 F. Supp. 843, 844-45 (N.D. Ill. 1973); see also Judge Huyett's excellent discussion of the personal involvement issue in *Fialkowski v. Shapp*, 405 F. Supp. 946, 949-54 (E.D. Pa. 1975).

III. *Warminster Township*

It is also clear that the motion to dismiss on behalf of Warminster Township must be granted insofar as the complaint is based on Section 1983 since the township is not a "person" within the meaning of that statute. *City of Kenosha v. Bruno*, 412 U.S. 511, 93 S.Ct. 2222 (1973); *Moor v. County of Alameda*, 411 U.S. 693, 93 S.Ct. 1785 (1973);

Note 5—*Continued*
beating of Pitrone or at least failed to protect the latter from the officer would, if proved at trial, be sufficient to subject them to Section 1983 liability. See *Byrd v. Brishke*, 466 F.2d 6, 11 (7th Cir. 1972); *Vun Cannon v. Breed*, 391 F. Supp. 1371, 1374 (N.D. Cal. 1975); cf. *Howell v. Cataldi*, 464 F.2d 272, 282 (3d Cir. 1972).

Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473 (1961). However, jurisdiction over the township is also asserted under the general federal question statute, 28 U.S.C. §1331, and since the requisite amount in controversy has been alleged[6] I must face the merits of this contention.

Two questions are involved: (1) Is there jurisdiction over the municipality pursuant to Section 1331? and (2) Does the complaint state a cause of action? The notion that a civil rights action may be maintained against a municipality in federal court pursuant to 28 U.S.C. §1331 despite the fact that the municipality is not a "person" within the meaning of 42 U.S.C. §1983, seems to have stemmed from certain dicta in *City of Kenosha v. Bruno*, supra. In that case, after holding that a municipality is not a "person" for Section 1983 purposes regardless of the nature of the relief sought, the Supreme Court noted that the complaint had also asserted jurisdiction under 28 U.S.C. §1331. Since the lower court had not determined whether jurisdiction over the municipalities was properly laid under Section 1331, the court merely remanded the case to the district court for consideration of that issue, without in any way intimating what the appropriate disposition should be.[7]

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6. The complaint seeks compensatory damages of $5,000. and punitive damages of $10,000. against the township. Punitive damages are recoverable under certain circumstances in civil rights cases. *Spence v. Staras*, 507 F.2d 554, 558 (7th Cir. 1974); *Fisher v. Volz*, 496 F.2d 333, 346-48 (3d Cir. 1974); and since at this stage of the proceedings it is not clear to a legal certainty that plaintiff, if otherwise entitled to recover, would not be entitled to punitive damages of at least $5,000., I conclude that the requisite jurisdictional amount has been satisfied with respect to the claim against the township.

7. In relevant part, the Court stated:

> We have had the benefit of neither briefs, arguments, nor explicit consideration by the District Court of . . . the availability of §1331 jurisdiction in view of the state of the record below. We therefore remand the case to the District Court for consideration of these issues.

412 U.S. at 514, 93 S.Ct. at 2227.

Drawing from this relatively benign language,[8] several federal courts have ruled that municipalities may not be dismissed from civil rights cases where Section 1331 is pleaded as a basis of jurisdiction. E.g. *Brault v. Town of Milton*, 527 F.2d 730, 734 (2d Cir. 1975) (panel) rev'd on other grounds on reconsideration en banc, *id.* at 736; *Skehan v. Board of Trustees of Bloomsburg State College*, 501 F.2d 31, 44 (3d Cir. 1974) vacated, 421 U.S. 983, 95 S.Ct. 1986 (1975) on remand, slip op. filed June 21, 1976 (en banc); *Patterson v. City of Chester*, 389 F. Supp. 1893, 1095-96 (E.D. Pa. 1975); *Maybanks v. Ingraham*, 378 F. Supp. 913, 914-15 (E.D. Pa. 1974); *Dahl v. City of Palo Alto, supra*, 372 F. Supp. at 649-51; see *Rotolo v. Borough of Charleroi*, supra, 532 F.2d at 922; *United Farmworkers of Florida Housing Project, Inc. v. City of Delray Beach*, 493 F.2d 799, 801-02 (5th Cir. 1974).[9] In one sense, of course, these decisions are clearly correct; that is, given the

8. I disagree with the court's statement in *Dahl v. City of Palo Alto*, 372 F. Supp. 647, 650 (N.D. Cal. 1974) that ". . . the only fair reading of the opinion is that the Court [in *Kenosha*] assumed that had the amount in controversy requirement been met, jurisdiction would lie [against the city]." Only the concurring opinion of Justice Brennan, joined in by Justice Marshall, made such an assumption.

9. See also *Hostrop v. Board of Junior College District Number 515*, 523 F.2d 569 (7th Cir. 1975), cert. denied 44 USLW 3624 (U.S. May 3, 1976); *Hanna v. Drobneck*, 514 F.2d 393 (6th Cir. 1975); *Adkins v. Duval County School Board*, 511 F.2d 690 (5th Cir. 1975); *Clark v. Illinois*, 19 Crim. L. Rptr. 2267 (N.D. Ill., filed May 19, 1976); *Marvasi v. Shorty*, 70 F.R.D. 14 (E.D. Pa. 1976); *Barszca v. Board of Trustees*, 400 F. Supp. 675 (N.D. Ill. 1975); *Devore v. Edgefield County School District*, 68 F.R.D. 423 (D. S.C. 1975); *Everette v. City of Chester*, 391 F. Supp. 26 (E.D. Pa. 1975); *Peacock v. Board of Reagents*, 380 F. Supp. 1081 (D. Ariz. 1974), aff'd 510 F.2d 1324 (9th Cir.), cert. denied, 422 U.S. 1049, 95 S.Ct. 2668 (1975); *Hines v. D'Artors*, 383 F. Supp. 184 (W.D. La. 1974); *Waltenberg v. New York Dept. of Corrections*, 376 F. Supp. 41 (S.D. N.Y. 1974); *Moore v. City of Green Bay*, 372 F. Supp. 40 (E.D. Wisc. 1974).

requisite amount in controversy and a complaint alleging a claim "arising under, *inter alia*, the Constitution," Section 1331 by its terms grants the district courts *jurisdiction* over a municipality or anybody else. *Bell v. Hood*, 327 U.S. 678, 66 S.Ct. 773 (1946); see *Brault v. Town of Milton*, supra, 527 F.2d at 736 n. 1. But Section 1331 is merely a jurisdictional statute and provides no substantive basis for relief. See *Gresham v. City of Chicago*, 405 F. Supp. 410, 412 (N.D. Ill. 1975); *Jamison v. McCurrie*, 388 F. Supp. 990, 991-92 (N.D. Ill. 1975); *Perry v. Linke*, 394 F. Supp. 323, 325 (N.D. Ohio 1974).

Because the township is not a person for Section 1983 purposes the only possible substantive basis for relief against it would be through the implication of a private cause of action directly from the Fourteenth Amendment. Few of the cases cited above, and, in particular, none emanating from the Court of Appeals for this Circuit, have specifically addressed the Fourteenth Amendment cause of action question.[10] Cf. *Roach v. Klugman*, Civil Action No. 73-2428 (E.D. filed April 30, 1976) slip op. at 13-14. Most of those courts which have considered the question and concluded that the Fourteenth Amendment provides a private cause action against municipalities based their holdings on *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 91 S.Ct. 1999 (1971). See *Brault*, *Patterson*, and *Maybanks*, supra. With deference to these courts, I do

10. I recognize that certain language in *Skehan*, supra, may be interpreted as implying that there can be a direct Fourteenth Amendment cause of action against municipalities; however, I do not so read that case. Rather, I believe that a proper interpretation of this aspect of *Skehan* is merely that a nonfrivolous assertion of a Fourteenth Amendment violation by a governmental subdivision resulting in damages of over $10,000. gives the district courts *jurisdiction* over the municipality pursuant to Section 1331. See *Bell v. Hood*, supra. Even if *Skehan* were to be interpreted as authorizing a Fourteenth Amendment cause of action against municipalities its continuing validity in light of *Aldinger v. Howard*, 44 U.S.L.W. 4988 (U.S. June 24, 1976) would be questionable.

not believe that the rationale of *Bivens* can be extended to support a cause of action against a municipality based directly on the Fourteenth Amendment.

In *Bivens* the court found a cause of action based on the Fourth Amendment in a situation where, absent the implication of such relief, the plaintiff would have had no federal[11] remedy for the violation of a clearly established federal constitutional right. This anomaly resulted from the combined facts that Section 1983 does not apply to actions under color of *federal* law and that at the time *Bivens* arose, the Federal Tort Claims Act did not provide a remedy against the United States for the wrongful acts of its law enforcement officers.[12] The case for implication of a private cause of action against a municipality under the Fourteenth Amendment is significantly less compelling. See *Graham*, supra, 40 F. Supp. at 412.

First of all, unlike the situation in *Bivens*, the plaintiff here is not without remedy absent the implication of a constitutional cause of action since he unquestionably may seek Section 1983 relief against the individual police officers. A second and more important factor distinguishing this case from *Bivens* is that here Congress has spoken; the legislative history of Section 1983 as described in *Monroe*, *Moor*, and *Bruno*, supra, makes it clear that Congress did not want municipalities to be subjected to damage suits for civil rights violations. Thus, one of the major underpinnings of *Bivens* is missing. As construed in the Supreme Court cases just cited, Section 1983 amounts to "an explicit congressional declaration that persons injured by a [municipality's] violation of the [Fourteenth Amendment] may not recover money damages against [it]." The fact that in

11. The *Bivens* Court found inadequate whatever state law tort remedies the plaintiff might have had available. 403 U.S. at 394-95, 91 S.Ct. at 2003-04.

12. The Federal Tort Claims Act has since been amended to cover such activities. Act of March 16, 1974, Pub. L. 93-253, §2, 88 Stat. 50, amending 28 U.S.C. §2680(h).

Section 1983 Congress did provide a federal remedy against individuals who commit civil rights violations also seems to satisfy the requirement of "another remedy, equally effective in the view of Congress," which the *Bivens* court indicated would weigh against implying a cause of action directly from the Constitution.[13] 403 U.S. at 397, 71 S.Ct. at 2005. See *Jamison*, supra, 388 F.Supp. at 991-92; *Perry*, supra, 394 F.Supp. at 326.

A third factor weighing against the implication of a Fourteenth Amendment cause of action against municipalities is that where the plaintiff in a conventional civil rights action is merely seeking declaratory or injunctive relief it will generally make little difference whether the named defendant is the governmental entity itself[14] or the appropriate governmental official responsible for carrying out the challenged activity.[15] Only where the plaintiff seeks damages does the presence or absence of the municipality

13. I do not agree with the suggestion that the existence of a direct Fourteenth Amendment cause of action should depend upon whether the acts upon which the suit is based violate the "specific mandates of the Constitution" or only more general notions of due process. *Clark*, supra, 19 Crim. L. Rptr. at 2267-68; *Jamison*, supra, 388 F. Supp. at 992. The conflict with Section 1983 remains the same whether the constitutional deprivation be characterized as "general" or "specific".

14. Prior to *Kenosha*, it had been held that the Fourteenth Amendment did provide a basis for equitable relief against political subdivisions of states, but not for monetary damages. See e.g., *Bennett v. Gravelle*, 323 F. Supp. 203, 216-18 (D. Md.) aff'd 451 F.2d 1013 (4th Cir. 1971) cert. denied, 407 U.S. 917, 92 S.Ct. 2451 (1972). *Kenosha*'s holding that there is no distinction for Section 1983 purposes between equitable and monetary relief undermines the continuing validity of cases such as *Bennett*.

15. The possibility that there might be more than one official involved in administering a particular program or that normal personnel turnover might result in periodic changes in the identity of the official involved do not alter this conclusion in view of the liberal joinder and substitution of parties provisions of the Federal Rules of Civil Procedure. Neither is there cause for con-

in the case make any significant difference. In that situation being able to sue the municipality would usually assure the plaintiff of at least one party capable of satisfying a substantial monetary judgment should he prevail at trial.[16] See *Moor*, supra, 411 U.S. at 700, 93 S.Ct. at 1791. But the possibility of a monetary recovery against the municipality, which is the practical basis for the plaintiff's desire to name it as a defendant, is also the very reason why Congress would not (and indeed believed it could not) include municipalities within Section 1983 and why the Supreme Court in *Monroe v. Pape*, supra, held that Congress could not have intended the word "person" in that statute to encompass municipalities.

In addition to relying on *Bivens*, at least one court has advanced a second rationale in support of a direct Fourteenth Amendment cause of action against municipalities. Drawing from the remarks of Senator Thurmon during the floor debate on Section 1983, the court in *Dahl*,[17] supra, suggested that what Congress was really concerned about in excluding municipalities from Section 1983 was the absence of a required amount in controversy in its jurisdictional counterpart, now 28 U.S.C. §1343, thus leaving open the possibility that municipalities might be subject to suit in federal court on the most petty of claims. 372 F.Supp. at 651. The problem with this reasoning is that as the Supreme Court pointed out in *Moor*, supra, 411 U.S. at 708, 93 S.Ct. at 1795, the primary reason for excluding

Note 15—Continued

cern that personnel changes might render a court's grant of declaratory or injunctive relief ineffectual since "[this court] would . . . look with some disfavor upon any City official's actions which were inconsistent with [its rulings]." *United Farmworkers*, supra, 493 F.2d at 802 n. 3.

16. Plaintiff here frankly admits that this is one of his reasons for naming the municipality as a defendant. See Plaintiff's Answer to the Motion to Dismiss, paragraph 5.

17. See also Judge Smith's opinion for the panel in *Brault*, supra, 527 F.2d at 735.

municipalities from Section 1983 was "legislative concern as to Congress' constitutional power to impose liability on political subdivisions of the States." Whether this concern was justified is not important. *Id.* at 709, 93 S.Ct. at 1795. Rather, the important thing is that Congress' exclusion of municipalities on this basis could not have depended upon the amount of the claim involved.

Furthermore, to the extent that Congress was also concerned that municipalities not be subjected to crushing liabilities which might threaten their very existence, see Note 89 Harv. L. Rev. 922, 948 & n. 139 (1976), limiting damage suits to those claiming over $10,000 would certainly not further the congressional goal.

Finally, there is the Supreme Court's recent decision in *Aldinger v. Howard*, 44 U.S.L.W. 4988 (U.S. June 24, 1976). Although that case did not specifically deal with the question under consideration here.[18] The Court's analysis of the related problem of "pendent party" jurisdiction is instructive. In holding that the district courts may not exercise pendent jurisdiction over a county on a state law claim factually related to a Section 1983 claim against county officials, the court relied heavily on Congress' exclusion of state governmental subdivisions from the reach of that statute.

> [T]he question whether jurisdiction over the instant lawsuit extends not only to a related state law claim but to the defendant against whom that claim is made, turns initially not on the general contours of the language in Art. III, i.e., "Cases arising under," but upon *the deductions which may be drawn from congressional statutes as to whether Congress wanted to grant this sort of jurisdiction to federal courts*. Parties such as counties whom Congress *excluded* from liability in §1983, and therefore by reference in the grant of jurisdiction under §1343(3), can argue with a great deal

18. 44 U.S.L.W. at 4989 n. 3.

> of force that the scope of the "civil action" over which the district courts have been given statutory jurisdiction should not be so broadly read as to bring them *back* within that power merely because the facts also give rise to an ordinary civil action against them under state law.
>
> . . .
>
> [W]e think a fair reading of the language used in §1343, together with the scope of §1983, requires a holding that the joinder of a municipal corporation . . . for purposes of asserting a state law claim not within federal diversity jurisdiction, is without the statutory jurisdiction of the district court. (footnote omitted).

44 U.S.L.W. at 4993. The Supreme Court's conclusion that "Congress has by implication declined to extend federal jurisdiction over [a municipality]," *id.*, makes it highly unlikely that the Court would be willing to sanction the implication of a direct Fourteenth Amendment claim against such a party either. After all, to do so would be merely another way of subjecting to liability for civil rights violations those whom Congress has by statute chosen to exclude.

For the reasons stated, I believe that no direct Fourteenth Amendment cause of action against the Township of Warminster should be implied.

Having reached a decision with respect to plaintiff's federal claims, I turn lastly to consideration of his pendent state law claims of assault and battery and negligence. It is indisputable that the state and federal claims against the individual defendants arise from a "common nucleas of operative facts" thus giving this court judicial power over both. *United Mine Workers v. Gibbs*, 363 U.S. 715, 725, 86 S.Ct. 1130, 1138 (1966). The defendants have pointed to no complex or unresolved questions of state law which would counsel against adjudicating the state claims and doing so will undoubtedly save time and conserve judicial

resources. I will therefore exercise my discretion in favor of having the pendent state claims against the individual defendants decided in this court. With respect to the state claims against the Township of Warminster, *Aldinger*, supra is controlling. Since there is no basis for the federal claims against the township, that case makes it clear that I may not adjudicate any state law claims against it by treating the township as a "pendent party."

Although I conclude that the refusal to find an implied Fourteenth Amendment cause of action against the township is appropriate, I nonetheless recognize that there are legitimate arguments for reaching a different result and that my decision is in conflict with those of three distinguished members of this court[19] as well as with a permissible interpretation of the Court of Appeals decision in *Skehan*. For these reasons, I believe that there is no just reason to delay the plaintiff's seeking review in the Court of Appeals of my decision dismissing the township. Since my decision with respect to the township qualifies as a final judgment completely disposing of the claims against one or more but fewer than all the parties, I will therefore enter an order expressly directing the entry of judgment for the township pursuant to Federal Rule of Civil Procedure 54(b), thus permitting an immediate appeal.

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19. *Patzig v. O'Neill*, Civil Action Nos. 76-514/1287 (E.D. Pa. filed July 30, 1976); *Patterson v. City of Chester*, 389 F. Supp. 1093 (E.D. Pa. 1975) (Weiner, J.); *Maybanks v. Ingraham*, 378 F. Supp. 913 (E.D. Pa. 1974) (Lord, C.J.); *Harris v. City of Philadelphia*, Civil Action No. 75-3662 (E.D. Pa.) (unpublished order of Cahn, J., filed September 7, 1976).

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN DAVID PITRONE
335 Aspen Street
Warminster, Pennsylvania

CIVIL ACTION

No. 75-2455

v.

POLICE OFFICER LOUIS J. MERCADANTE
POLICE OFFICER THOMAS MC MAHON
POLICE OFFICER JOHN LANGDON
OTHER UNKNOWN POLICE OFFICERS
CHIEF OF POLICE ROWEN KELLY
WARMINSTER TOWNSHIP
all situate at the intersection of
HENRY and GIBSON Avenues
Warminster, Pennsylvania

ORDER

AND NOW, this 30th day of September, 1976, for the reasons set forth in the foregoing opinion, the motion to dismiss is granted as to the Township of Warminster, Pennsylvania, and it is expressly directed that final judgment be entered in its favor pursuant to Federal Rule of Civil Procedure 54(b). The motion to dismiss is denied as to all other defendants.

BY THE COURT:

/s/

IN THE

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 76-2593

JOHN DAVID PITRONE,
Appellant

v.

POLICE OFFICER LOUIS J. MERCADANTE; POLICE OFFICER THOMAS MC MANN; POLICE CAPTAIN ROWEN KELLEY; WARMINSTER TOWNSHIP, PA., *Appellees*

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 75-2455)

Argued September 9, 1977

Before: SEITZ, *Chief Judge* and GIBBONS and WEIS, *Circuit Judges*.

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OPINION OF THE COURT
(Filed February 21, 1978)

PER CURIAM.

This is an appeal from a district court determination that a federal cause of action against a municipality may not be implied from the Fourteenth Amendment. The court also refused to hear the plaintiff's pendent state law claims against the municipality, believing that the decision of the Supreme Court in *Aldinger v. Howard*, 427 U.S. 1 (1976), prevented the court from exercising its discretion to hear those pendent claims. After the district court had entered its order, we decided in *Gagliardi v. Flint*, 564 F.2d 112 (3d Cir. 1977), *petition for cert. filed*, 46 U.S.L.W. 3392, (U.S. Nov. 7, 1977) (No. 77-657), that pendent jurisdiction may properly be exercised in circumstances similar to this case. Accordingly, we remand to afford the district court an opportunity to reconsider its decision.

Plaintiff Pitrone alleged that he was unconstitutionally arrested, detained, and beaten by police officers employed by the Township of Warminster. He brought an action in the district court against the township alleging jurisdiction under 28 U.S.C. §1343(3). Pendent state claims against the municipality and the officers were also asserted. The district judge held there was no cause of action against the township directly under the Fourteenth Amendment, then dismissed the pendent state claim, saying, "[s]ince there is no basis for the federal claims against the township, that case [*Aldinger v. Howard*, 427 U.S. 1 (1976)] makes it clear that I may not adjudicate any state law claims against it by treating the township as a 'pendent party.'" 420 F. Supp. 1384, 1391 (E.D. Pa. 1976). The district court then granted certification under Fed R. Civ. P. 54(b) on the question of the township's liability.

Aldinger v. Howard, supra, held "only that a city may not be joined as a pendent party to an action when there is no independent source of federal jurisdiction over" that party. *Gagliardi v. Flint*, 564 F.2d at 115 n. 2. In *Aldinger, supra*, the plaintiff asserted a federal cause of action based on 42 U.S.C. §1983 against a county and certain individual

defendants. She asserted jurisdiction under 28 U.S.C. §1343(3). The courts below rejected the §1983 claim against the municipality as foreclosed by the decisions of the Supreme Court in *City of Kenosha v. Bruno*, 412 U.S. 507 (1973), and *Moor v. Alameda County*, 411 U.S. 693 (1973). Plaintiff argued alternatively that the county could be joined as a pendent party on state law claims which arose from the same facts as those underlying the federal cause of action against the individual defendants. Because those federal claims against the individuals also rested on 42 U.S.C. §1983 and 28 U.S.C. §1343(3), the Supreme Court held that the congressional policy implicit in those statutes against municipal liability prevented the exercise of pendent jurisdiction over the county where no independent basis of federal jurisdiction over the municipality existed. *Aldinger v. Howard*, 427 U.S. at 16-19.

By way of contrast, in both *Gagliardi* and this case, an independent basis for federal jurisdiction does exist. In *Gagliardi*, as here, plaintiff asserted a cause of action directly under the Fourteenth Amendment, alleging jurisdiction under 28 U.S.C. §1331. We held that the Fourteenth Amendment issue was a sufficiently substantial federal question to vest the court with jurisdiction under 28 U.S.C. §1331.[1] Accordingly, *Gagliardi* approved the district court's exercise of its discretion to hear the pendent state claims before deciding the federal constitutional question of the existence of a cause of action. *See Hagans v. Lavine*, 415 U.S. 528 (1974); *Siler v. Louisville & Nashville Railroad*, 213 U.S. 175 (1909).

Similarly, in this case the plaintiff's assertion of a Fourteenth Amendment cause of action was enough to vest the district court with jurisdiction over the municipality.

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1. The fact that courts of appeal have differed in resolving the question demonstrates that the claim cannot be dismissed as insubstantial. *Compare, e.g.*, Kostka v. Hogg, 560 F.2d 37 (1st Cir. 1977), *with* Gentile v. Wallen, 562 F.2d 193 (2d Cir. 1977), *and* Owen v. City of Independence, 560 F.2d 925 (8th Cir. 1977).

Since an independent basis for federal jurisdiction existed, *Aldinger* is no barrier to hearing the pendent state claims. The district court therefore should be given an opportunity to exercise its discretion to hear the pendent state claims before deciding the federal constitutional issue. We note that the district judge did decide to exercise pendent jurisdiction over the state claims against the individual officers, and presumably the same evidence would be relevant to the pendent claims against the township as well.

The judgment of the district court will be vacated, and the case remanded to the district court for further consideration consistent with this opinion.

TO THE CLERK:

PLEASE FILE THE FOREGOING OPINION.

Re: John David Pitrone, Appellant, v.
Police Officer Louis J. Mercadante, et al.
No. 76-2593

GIBBONS, *Circuit Judge*, concurring

While I join the opinion of the Court, I continue to subscribe fully to the views expressed in my concurring opinion in *Gagliardi v. Flint*, 564 F.2d 112, 117 (3d Cir. 1977), *petition for cert. filed*, 46 U.S.L.W. 3392 (U.S. November 7, 1977). In *Gagliardi* I made three basic points. First, the case law of this circuit already establishes that, for suits against municipal corporations based on alleged fourteenth amendment violations by their agents, 28 U.S.C. §1331 affords jurisdiction and the Federal Rules of Civil Procedure provide a law of remedies. Second, those prior decisions are both sound and entirely consistent with the existing pronouncements of the Supreme Court. Third, when a pendent state law claim provides an available ground of decision, the preferred course, dictated by the policy announced in *Siler v. Louisville & Nashville R.R.*, 213 U.S. 175 (1909), is to decide the case on that ground.[1]

The course adopted both here and in *Gagliardi v. Flint*, *supra*, will probably make it unnecessary for this Court ever again to impose liability on municipalities directly under the fourteenth amendment. In two states in this circuit municipal corporations are already liable on a respondeat superior basis for the torts of their agents. *Jackson v. Hankinson*, 51 N.J. 230, 238 A.2d 685 (N.J. Sup. Ct. 1968); *Ayala v. Philadelphia Bd. of Educ.*, 453 Pa. 584, 305 A.2d 877 (Pa.Sup.Ct. 1973). The current state of the law in Delaware is not entirely clear. But in *Pajewski v. Perry*,

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1. At least one of my brothers obviously disagrees with each of these views. *See* Mahone v. Waddle, No. 76-1377/8 (3d Cir. Aug. 24, 1977) (Garth, J., concurring in part and dissenting in part).

363 A.2d 429 (Del. Sup. Ct. 1976), the Supreme Court of Delaware held that state sovereign immunity is waived if a state insurance program covers the particular risk which gave rise to the lawsuit. That decision, coupled with the court's discussion of municipal immunity as an aspect of sovereign immunity, may well point in Delaware toward the abolition of municipal immunity for torts committed by agents engaging in governmental activities, if, as is usually the case, there is insurance coverage. These sensible state law developments demonstrate that governmental entities employing agents whose activities may cause harm have no less obligation to assume the risk of such harm than do private persons or non-governmental business entities. It is equally sensible for federal courts, in the exercise of their pendent jurisdiction, to rely first on a state tort cause of action and state law respondeat superior liability of municipalities rather than on a federal constitutional cause of action and a respondeat superior liability implied from the fourteenth amendment. Moreover, even if a particular plaintiff has failed to plead the state cause of action, he should be permitted to amend his complaint in order to incorporate such a theory. Only by such a liberal amendment practice will the policy enunciated in *Siler v. Louisville & Nashville R.R.*, *supra*, be served. At the same time, the availability of jurisdiction over municipal corporations under 28 U.S.C. §1331 ensures that a litigant's choice of a federal forum for complaints against state governmental agents will be preserved without the necessity of a separate state-court action against the deep-pocket defendant.

Although the preferred course is to decide cases such as this on the basis of state tort law, cases may arise in the future where the governmental agent is not liable under state tort principles but is liable directly under the Federal Constitution. *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). Whether such suits take place in state or federal forums, the fourteenth amendment and the federal cases interpreting it will measure the legality.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 76-2593

JOHN DAVID PITRONE,
Appellant

v.

POLICE OFFICER LOUIS J. MERCADANTE; POLICE OFFICER THOMAS MC MANN; POLICE CAPTAIN ROWEN KELLEY; WARMINSTER TOWNSHIP, PA., *Appellees*

(D.C. Civil Action No. 75-2455)

On Appeal from the United States District Court
for the Eastern District of Pennsylvania.

Present: SEITZ, *Chief Judge*, GIBBONS and WEIS, *Circuit Judges*.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel on September 9, 1977.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed September 30, 1976, be, and the same is hereby vacated, and the cause remanded to the said District Court for further consideration consistent with the opinion of this Court.

ATTEST:

/s/
CLERK

February 21, 1978